No. 07-285

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IN THE

Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC. d/b/a
PROGRESSIVE BUSINESS PUBLICATIONS,
Petitioner,

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA
and BETTER BUSINESS BUREAU OF
METROPOLITAN WASHINGTON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania properly sustained the judgment entered on a jury verdict in favor of defendants-respondents, where

(a) the trial court held, in a ruling not disturbed on appeal, that the alleged defamatory statements were true and that petitioner failed to introduce evidence of falsity;

(b) the trial court held, in a ruling not disturbed on appeal, that the alleged defamation was in any event a statement of opinion;

(c) the trial court held, in a ruling not disturbed on appeal, that petitioner failed to prove any actual damages;

(d) to recover exemplary or punitive damages, petitioner was required to prove *New York Times* "malice," precisely the legal standard on which the jury was instructed; and

(e) even as to compensatory damages, the jury was properly instructed under the *New York Times* "malice" standard, because petitioner is a limited-purpose public figure.

CORPORATE DISCLOSURE STATEMENT

The Better Business Bureau of Metropolitan Washington owns 100% of the assets of respondent Better Business Bureau of Eastern Pennsylvania. Respondent Better Business Bureau of Metropolitan Washington has no parent corporation. No publicly held corporation owns 10% or more of the stock of the Better Business Bureau of Metropolitan Washington.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Better Business Bureau of Eastern Pennsylvania and Better Business Bureau of Metropolitan Washington ("Better Business Bureaus") respectfully submit this brief in opposition to the petition for a writ of certiorari in this case. [1]

[1] The Better Business Bureau of Metropolitan Washington acquired the assets of the Better Business Bureau of Eastern Pennsylvania in October 2000. Both were named as defendants in this case. We refer to them collectively as the "Better Business Bureaus" or "Bureaus."

STATEMENT OF THE CASE

I. THE PARTIES AND HISTORY OF THE DISPUTE

It is undisputed that the Better Business Bureaus serve an important public purpose. The Better Business Bureaus are non-profit corporations formed to facilitate and promote fair, ethical, and consumer-friendly marketplace conduct. Among other services, the Better Business Bureaus provide a means by which consumers can research whether businesses have been the subject of consumer complaints filed with the Bureaus. They perform this function by receiving, collecting, and reporting consumer complaints submitted about the companies within their regions. In particular, the Bureaus issue "Reliability Reports" on such companies, describing the kind and volume of complaints received and assigning, in the opinion of the Bureaus, "satisfactory" or "unsatisfactory" ratings, or no rating at all. The Reports state explicitly that the Bureaus do not take a position on the accuracy of the consumer complaints received by the Bureaus.

When a consumer files a complaint with a Better Business Bureau, the Bureau forwards the complaint to the subject company, so that the company can provide a response. Once the response is received, consumers are asked to let the Better Business Bureaus know whether or not they are satisfied with the outcome. Through this process, the Better Business Bureaus help to facilitate resolution of consumer complaints in the marketplace. If a company ignores a consumer complaint, the Better Business Bureaus may assign an unsatisfactory rating to the company.

Reliability Reports are an important means by which the Better Business Bureaus promote ethical marketplace conduct and provide a voice to consumers. The Reports contain general information about a company, as well as its record with the Better Business Bureaus. If a company does not respond to complaints that are forwarded to it by the Bureaus, the Bureaus inform the public. If the Bureaus receive a number of serious complaints describing the same problem, the Bureaus may issue a report rating the business as "unsatisfactory" because the complaints show a pattern of marketplace conduct. As the evidence in this case showed, petitioner received an unsatisfactory rating based on the number and kind of consumer complaints filed with the Better Business Bureaus.

Petitioner is a telemarketer and publisher of "fast-read" newsletters. By the time of trial, the Better Business Bureaus had received approximately 400 complaints from consumers who reported that they had received unordered subscriptions to petitioner's publications and then a bill for something that they did not order. The head of the Better Business Bureau of Eastern Pennsylvania testified that his review of every one of these hundreds of consumer complaints revealed a pattern of consumer claims that petitioner billed for unordered subscriptions. In 2001, the Better Business Bureaus issued a Reliability Report regarding petitioner. It stated:

> While this company responds to customer complaints presented to it by this Bureau, this company has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some customers have claimed that

> they cancelled subscriptions but their cancellations were not honored.

Pet. App. 3a.

The Reliability Report also contained the following disclaimer:

> As a matter of policy, the Better Business Bureau does not endorse any product, service, or company. [The Bureau's] reports generally cover a three-year reporting period, and are provided solely to assist you in exercising your own best judgment. Information contained in this report is believed to be reliable but not guaranteed as to accuracy. Reports are subject to change at any time.

Pet. App. 3a–4a (brackets in court's opinion).

Petitioner took issue with the Better Business Bureaus' Reliability Report, claiming that the numerous complaints made by consumers to the Better Business Bureaus reflected but a small portion of petitioner's total business volume. The Better Business Bureaus responded by updating the Reliability Report to read as follows:

> On March 16, 2001, Progressive Business Publications responded to the BBB concerning the company's unsatisfactory business performance report. The company sells its publications through telemarketing solicitations. It claims that it tape records telephone solicitations for quality control purposes. The company states that it obtains the ordering person's birthdate to verify the order at a later date. According to the company's correspondence, orders are confirmed by fax within 24 hours, giving the orderer an opportunity to respond. The company claims it

> has a liberal cancellation policy permitting the customer to cancel anytime within the first three months of the telephone order and receiving a refund on all unsent issues. New subscribers receive two free issues with the right to cancel according to the company. The company claims that its BBB complaint volume is negligible compared to its volume of business.

Pet. App. 4a–5a.

Petitioner employs hundreds of telemarketers to generate subscriptions to its publications. By comparison, petitioner employs fewer than ten customer service representatives to handle the consumer complaints and cancellation requests that petitioner receives. R. 1141a.[2]

According to petitioner's telemarketing director, the company's marketing employees make approximately 25 million calls per year in an effort to solicit subscriptions. Pet. App. 31a. To increase sales volume, petitioner's telemarketers offer consumers at businesses around the country a two-issue "free trial" subscription; petitioner then begins billing the consumer's employer for the subscription as soon as the "free trial" is over. Petitioner's business generates approximately $29 million in annual revenue. *Id.*

Petitioner sends the "free issues" of its mailings and a bill for hundreds of dollars to the person solicited on the telephone. If this bill is ignored, petitioner purposefully directs the next invoices for the purported order to the accounts payable department (which may have no idea whether a subscrip

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[2] "R." refers to the reproduced record filed in the Supreme Court of Pennsylvania.

tion was ordered) in the hopes that the bill will be paid. Pet. App. 2a. Petitioner admitted, notwithstanding the numerous complaints by consumers regarding this point, that petitioner intentionally omits a telephone number on its invoices. Customers thus lack a number to call to cancel the supposed "subscription." Pet. App. 45a. Nonetheless, 92% of petitioner's subscriptions eventually are cancelled. Pet. App. 30a.

After six months of non-payment, petitioner turns an account over to a collection agency, which aggressively pursues the account. At least $2 million in revenue is generated each year through collection agencies. Pet. App. 7a.

The hundreds of complaints on which the Better Business Bureaus relied in publishing the alleged defamatory statements in this case vividly demonstrate consumers' view of petitioner's business. These complaints reflect repeated efforts by consumers to cancel the supposed "free" subscriptions touted by petitioner's telemarketers. The complaints refer to petitioner's business practices as a "scam," "fraudulent," and "illegal." R. 5078a–5081a ("I believe this company is a scam."); R. 4337a–4344a ("I now am convinced that there is some kind of fraud involved in [PBP's] selling/marketing tactics."); R. 4365a–4374a ("[Progressive Business Publications] won't give up and we are not paying another bill for a SCAM."); R. 4444a–4452a ("This is blatant mail fraud."); R. 4514a–4529a ("I urge you to investigate this company, Progressive Business Publications or [*sic*] Malvern, PA. They have sent me fraudulent invoices and made illegal threats."); R. 5913a–5922a ("As I mentioned in my complaint to you, these practices of billing for magazines that have never

been received much less ordered borders on criminal behavior.").

II. THE PROCEEDINGS BELOW

The defamation case proceeded to trial in October 2003. At trial, petitioner argued that none of the complaints presented to the Better Business Bureaus had merit, that the complaint volume was negligible compared to its total sales volume, and that despite having "a record year every year" it had sustained damages as a result of the Better Business Bureaus' publication of the Reliability Report. Petitioner also argued that the Better Business Bureaus were negligent for failing to verify the accuracy of every complaint that was received. Petitioner asked the jury to award it nominal, compensatory, and punitive damages.

The Better Business Bureaus presented evidence of hundreds of complaints regarding petitioner's business practices, including the live testimony of three witnesses who themselves were frustrated in their attempts to cancel unwanted "no-risk" subscriptions to petitioner's newsletters. The Better Business Bureaus established that the statements in the Reliability Report characterizing petitioner's business practices as "unsatisfactory" were supported by the facts. The Better Business Bureaus also showed that petitioner earned record profits each year and spent large sums each year on marketing. Pet. App. 7a; 76a.

At the close of the evidence, the trial court instructed the jury on the applicable law. Included within the court's instructions was an instruction that the Better Business Bureaus were entitled to a conditional privilege to report on matters of public

concern, specifically the consumer reporting privilege. The court also instructed on the standard of fault necessary to overcome the Better Business Bureaus' conditional privilege, informing the jury that petitioner was required to prove actual knowledge of falsity or reckless disregard for the truth in order to overcome the privilege. R. 1986a. The trial court also instructed the jury on petitioner's obligation to satisfy the same standard as a precondition to any award of punitive damages. R. 1990a–1991a.

Within three hours of being charged, the jury returned a unanimous verdict in favor of the Better Business Bureaus.

After trial, petitioner moved for judgment notwithstanding the verdict and for a new trial. Among others things, petitioner challenged the standard of proof needed to overcome the Better Business Bureaus' conditional privilege in reporting on matters of public concern. Petitioner argued that under Pennsylvania law such a privilege could be overcome by a showing of mere negligence and that the heightened standard of actual knowledge of falsity or reckless disregard for truth need not be met. Acceptance of this argument, of course, would effectively eliminate the conditional privilege in Pennsylvania, because a showing of negligence is the minimal standard under which defamation liability could be imposed even in the absence of any privilege.

The trial court denied petitioner's post-trial motions. The court ruled that the jury instruction properly followed the Restatement (Second) of Torts § 600, requiring more than negligence to overcome a conditional privilege to report on matters of public concern. Pet. App. 73. The trial court further ruled that, even if the proper standard of fault was negli-

gence, petitioner could not have prevailed because (1) the alleged defamation was an expression of opinion rather than a statement of fact, (2) petitioner failed to prove that the alleged defamatory statements were false, and (3) petitioner failed to show that it suffered any damages as a result of the alleged defamation. Pet. App. 70a, 76a. Because petitioner failed on its essential elements of proof, it could not have recovered even if the standard of liability had been mere negligence.

Petitioner appealed to the Superior Court of Pennsylvania. Confirming that the statement at issue involved a matter of public concern and that the Better Business Bureaus were entitled to a jury instruction on the conditional privilege, the Superior Court affirmed the trial court and denied petitioner's request for a new trial.

Petitioner applied for review in the Supreme Court of Pennsylvania, questioning both the availability of a conditional privilege under Pennsylvania law and the proper standard of fault necessary to overcome the conditional privilege. After the case was accepted for review and fully briefed and argued, the Supreme Court of Pennsylvania ordered supplemental briefing on the issue of whether petitioner was a limited-purpose public figure, an issue that had been addressed in the trial court but had not been the subject of post-trial or appellate briefing.

The Supreme Court of Pennsylvania held that defamation defendants in Pennsylvania are no longer entitled to the protections of a conditional privilege to report on matters of public concern. In this respect, the court overruled the decisions of the trial court and the intermediate appellate court. The Supreme Court of Pennsylvania nevertheless affirmed the

judgment in favor of the Better Business Bureaus. It ruled that the record demonstrates that petitioner is a limited-purpose pubic figure and that therefore, to succeed on its defamation claim, petitioner was required to prove that the Better Business Bureaus published the alleged defamatory report with knowledge of its falsity or reckless disregard of whether the report was true or false.

The Supreme Court of Pennsylvania relied on the Fourth Circuit's opinion in *National Foundation of Cancer Research (NFCR) v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir. 1983), which held that an enterprise or corporation could create a public controversy through its own extensive marketing and solicitation activities, rendering it a limited-purpose public figure for purposes of public comment on those activities. The Supreme Court of Pennsylvania reasoned (1) that there was a subject-matter nexus between the content of petitioner's solicitation message and the allegedly defamatory statements commenting on petitioner's business performance record based on a pattern of customer complaints, and (2) that petitioner expended significant resources soliciting business and marketing its newsletter subscriptions. Pet. App. 31a. The Supreme Court of Pennsylvania observed that as a direct result of the millions of telemarketing solicitations each year, "hundreds of complaints were sent to the Better Business Bureau, and the statements of the Better Business Bureau were limited to reporting its receipt of such complaints and concluding that [petitioner's] business record was 'unsatisfactory' on the basis of this pattern of complaints." Pet. App. 31a. As the Supreme Court of Pennsylvania ruled, the Better Business Bureaus did not create the controversy; petitioner's massive

telemarketing effort generated the controversy that was presented to the Better Business Bureaus through the large volume of consumer complaints.

ARGUMENT

The petition for a writ of certiorari should be denied because petitioner could not recover even if petitioner were not characterized as a limited-purpose public figure. In rejecting petitioner's motion for a new trial, the trial court held that the Better Business Bureaus were merely stating an opinion, that petitioner failed to prove that the challenged statements were false, and that petitioner failed to prove that it sustained any damages. Pet. App. 70a, 76a. Petitioner therefore could not have prevailed under any standard of fault.

As a consequence of petitioner's failure to prove actual damages, the only conceivable award it could have hoped to obtain was an award of punitive damages. But because the Better Business Bureaus' speech involved a matter of public concern, petitioner could not have obtained a punitive damages award without showing that the Bureaus acted with "malice," *i.e.*, with knowledge of falsity or reckless disregard of the truth. Regardless of whether or not petitioner is a limited-purpose public figure, therefore, the trial court was required to instruct the jury on the actual malice standard with respect to petitioner's punitive damages claim.

In any event, the Supreme Court of Pennsylvania properly concluded that petitioner is a limited-purpose public figure with respect to complaints, and reports of complaints, generated by petitioner's own extensive and aggressive telemarketing solicitations and related billing and collection practices. The allegedly

defamatory statements at issue all concerned petitioner's interactions with the public and consumers' reactions to petitioner's conduct. The limited-purpose public figure characterization was justified, and further review is not warranted.

I. PETITIONER FAILED TO MEET ITS BURDEN OF PROOF ON THE ESSENTIAL ELEMENTS OF ITS DEFAMATION CLAIM.

Petitioner contends that it was prejudiced by being held to the actual malice standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1976), because it is not a limited-purpose public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Even if this argument had merit, which it does not, the petition for a writ of certiorari should be denied because petitioner could not prevail on its claims.

Under the Pennsylvania defamation statute, 42 Pa. Cons. Stat. § 8343, the burden of proving the truth of the allegedly defamatory communication normally falls on the defendant. Where, however, the speech in question involves a matter of public concern, which it undisputedly does in this case, the burden of proving falsity rests with the plaintiff. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *Lewis v. Philadelphia Newspapers, Inc.*, 833 A.2d 185, 191 (Pa. Super. Ct. 2003) ("If the statement in question bears on a matter of public concern, or the defendant is a member of the media, First Amendment concerns compel the plaintiff to prove, as an additional element, that the alleged defamatory statement is in fact false.").

In denying petitioner's motion for a new trial, the trial court ruled that "Defendants were merely

stating an opinion and therefore had no duty to investigate [the factual accuracy of the hundreds of consumer complaints they received]." Pet. App. 70a. The trial court also held that "it was Plaintiff's burden to prove that the alleged defamatory statement was false . . . [and] Plaintiff did not present such evidence." *Id.* The trial court further decided that "[b]ased on many customer complaints, there is truth to the statements published by Defendants regarding Plaintiff's unsatisfactory business performance." *Id.* at 76a.

Despite these rulings, petitioner asks this Court to grant review and hold that petitioner is not a limited-purpose public figure. Such a holding, petitioner asserts, would enable petitioner to retry this case under the lesser negligence standard and to argue that the Bureaus' "failure to investigate the complaints at issue constituted negligence." Pet. 2. The trial court, however, already concluded that even if negligence was the proper standard, petitioner could not prevail. Based on the rulings summarized above, even if this Court were to grant review and hold that petitioner is not a limited-purpose public figure under the facts of this case, the Better Business Bureaus nevertheless would be entitled to judgment in their favor.

This is also true because the trial court held that even if petitioner was correct in all of its arguments, it would not be entitled to a new trial because it "did not prove that it sustained any damages." Pet. App. 76a. The Pennsylvania defamation statute requires proof of damages that are actually and directly caused by the publication of an allegedly defamatory statement. 42 Pa. Cons. Stat. § 8343; *see Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 581 (E.D. Pa.

1999) (Pennsylvania does not presume damages in a defamation case, and the plaintiff must prove general damages attributable to the alleged defamatory statement); *Walker v. Grand Central Sanitation, Inc.*, 430 Pa. Super. 236, 250, 634 A.2d 237, 244 (1993) (defendant in a defamation per se case is "liable for the proven, actual harm the publication causes."). Petitioner's failure to prove damages is therefore fatal to its case regardless of the applicable standard of fault.

II. BECAUSE THE SPEECH AT ISSUE INVOLVED A MATTER OF PUBLIC CONCERN, PETITIONER'S PUNITIVE DAMAGES CLAIM REQUIRED PROOF OF ACTUAL MALICE REGARDLESS OF PETITIONER'S STATUS.

In refining the application of the actual malice standard articulated in *New York Times Co. v. Sullivan* to encompass only those private individuals who fairly can be characterized as public figures or limited-purpose public figures, the *Gertz* Court carefully restricted the States' ability to award damages under a lesser standard of liability. The Court made clear that, before a State could authorize an award of presumed or punitive damages even in the case of a purely private plaintiff, the *New York Times* standard would need to be satisfied.

> Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for

> defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But ***this countervailing state interest extends no further than compensation for actual injury***. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Gertz, 418 U.S. at 348–49 (emphasis added). The Court explained the rationale behind this limitation:

> The largely uncontrolled discretion of juries to award damages ***where there is no loss*** unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Id. at 349 (emphasis added).

Under *Gertz*, therefore, petitioner could not recover punitive damages unless it could prove that the Better Business Bureaus published a false and defamatory statement with knowledge of its falsity or reckless disregard of the truth. This is so regardless of whether petitioner was deemed to be a private

figure or a limited-purpose public figure—the standard of fault petitioner was required to meet as a precondition for a punitive damages recovery was the same. This is a further reason why review is not warranted.[3]

III. THE SUPREME COURT OF PENNSYLVANIA CORRECTLY HELD THAT PETITIONER IS A LIMITED-PURPOSE PUBLIC FIGURE.

As the Better Business Bureaus argued in the trial court and in response to the Supreme Court of Pennsylvania's request for post-argument briefing, petitioner qualifies as a limited-purpose public figure under the standard set forth in *Gertz*. The Court in *Gertz* identified two categories of public figures who, by virtue of that status, must satisfy elevated standards of proof when prosecuting defamation claims.

The Court held first that "an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all

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[3] Several years after *Gertz*, the Court ruled in *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), that, where the plaintiff is a purely private person and the speech at issue does *not* involve a matter of public concern, States may authorize an award of presumed or punitive damages even absent a showing of "actual malice." *Dun & Bradstreet* cannot help petitioner here, where the speech at issue undisputedly *does* involve a matter of public concern. Pet. App. 56a-57a. *See, e.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 929 (3d Cir. 1990) ("When the plaintiff is a private figure but the speech involves a matter of 'public concern,' the states may define for themselves the appropriate standard of liability; however, they may not impose liability without fault, nor allow presumed or punitive damages without a showing of actual malice.").

contexts." 418 U.S. at 351. The Court also ruled that even a person who is not generally a public figure may be considered a public figure for limited purposes where the "individual voluntarily injects himself or is drawn into a particular public controversy." *Id.* In both cases, an important consideration in determining public-figure status is "the vigor and success with which [a person] seek[s] the public's attention . . . ." *Id.* at 342. When the issue is whether a person qualifies as a limited-purpose public figure, a court normally should consider the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

Petitioner qualifies as a limited-purpose public figure, because petitioner thrust itself before the public for the purpose of influencing consumers, and, as a consequence of petitioner's own actions, consumers responded in a critical way through complaints to the Better Business Bureaus. Petitioner has assumed the risk of such public criticism about the very manner in which petitioner has chosen to engage the public.

Petitioner has made significant and deliberate efforts to inject itself into the national consciousness through massive telemarketing, sales, and self-promotion of its offers of "no-risk" trial subscriptions to its newsletters. It is this very activity that generated the hundreds of consumer complaints that formed the basis of the Better Business Bureaus' report and of petitioner's defamation claim. The underlying controversy to which the Better Business Bureaus' single report related is a controversy that petitioner itself created. Nothing in *Gertz* or its progeny precludes an entity from becoming a limited-

purpose public figure as a result of its own commercial activities and its aggressive pursuit of the consuming public.

The cases cited by petitioner in an effort to demonstrate the contrary are inapposite. *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (scientist who received federal funding that was categorized by a U.S. Senator as wasteful government spending held not to be limited-purpose public figure by virtue of his involvement in publicly-funded research); *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157 (1979) (failure to appear in response to grand jury subpoena regarding alleged espionage on behalf of the Soviet Union held not sufficient to classify plaintiff as limited-purpose public figure). In neither case did the plaintiff himself create the public controversy through substantial contact with and solicitation of the public.

Relying on massive telemarketing, direct mail, and internet marketing campaigns, petitioner markets its fast-read newsletters to consumers around the country. R. 1420a. During the four-year period of 1998–2001 alone, petitioner spent millions of dollars on marketing. R. 2506a–2550a. Between 1998 and 2001, petitioner employed ***15,000 telemarketers*** (R. 1369a), who generated millions of calls to potential consumers. Operating on petitioner's instructions, these telemarketers told their targets that they could receive one of petitioner's 50 publications at "NO RISK," that two issues would be sent "free of charge," and that the recipients could "just write cancel and there will be no cost involved". R. 2424a-2425a. Of petitioner's approximately 600 current employees, more than 500 are telemarketers, who generate about ***25 million calls*** each year. R. 1141a; 1165a.

In addition, petitioner offered testimony that it made nearly ***74 million mailings*** in the year 2003 alone, costing petitioner more than $2 million annually. R. 1126a. Petitioner is the largest customer of its local post office. R. 1345a.

The Better Business Bureaus published a Reliability Report that commented on the controversy Petitioner created by its aggressive marketing campaign. Petitioner's own actions prompted hundreds of complaints to the Better Business Bureaus. Consumers reported that petitioner's offer was not in fact "no risk" and that they were charged for subscriptions that they did not want and that they had tried to cancel. The Better Business Bureaus did not create the controversy and drag petitioner in involuntarily. As the Supreme Court of Pennsylvania observed, Petitioner's business activity specifically generated the very issue about which the Better Business Bureaus reported. Pet. App. 31a–32a.

Given petitioner's manner of telemarketing its subscriptions to the consuming public, it is not surprising that these activities have generated the significant, negative public response evidenced by the complaints received by the Bureaus. The use of telemarketing to solicit business has become an important matter of public interest and concern. In response, in recent years, consumer advocacy groups, Congress, and the Federal Trade Commission have worked to restrict the manner in which telemarketing may be conducted in the United States. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 1601 *et seq.* (1994); Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991). There can be little dispute that the manner in which petitioner predominantly markets its prod-

ucts is the subject of intense criticism and public debate.

The decision that petitioner is a limited-purpose public figure for purposes of public commentary on petitioner's own business practices in dealing with consumers is entirely reasonable and consistent with *Gertz*. Moreover, for the reasons explained above, even a contrary ruling would not produce a different outcome in this case. Especially in these circumstances, intervention by this Court is not justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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